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In The
Supreme Court of the United States

ROBERT SHAW, LARRY BEARLEY, MICHAEL MAHONEY, MYRON BEESON, and RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

May state prison officials, consistent with the First Amendment, punish an inmate for the contents of a letter he writes to another inmate who has been charged with assaulting a corrections officer, where (a) the letter offers information and advice relating to the defense of the assault charge, (b) the prison has no rule that forbids prisoners from writing letters to one another, and (c) the punishment is imposed because the information and advice criticizes the corrections officer?

PARTIES

All parties are listed in the caption.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Statement of Facts.

This case arose when the Petitioners (hereinafter "the Prison") punished a Montana State Prison inmate, Respondent Kevin Murphy, after he wrote a letter to another inmate, Pat Tracy. The letter contained information relevant to Tracy's defense to a criminal charge of assault on a prison guard. He also offered Tracy advice about the criminal charge. Murphy was punished because he made comments that criticized the prison guard, even though they were material to Tracy's defense.

The State of Montana admits evidence of the character of the alleged victim to support a claim of self defense. *See* Rules 404(a)(2); 405, Mont. R. Evid. (party may offer testimony about reputation of, and about specific instances of conduct by, alleged victim); *State v. Shadwell*, 22 Mont. 559, 572, 57 Pac. 281, 286 (1899) (holding evidence of prior threats and violent acts by deceased relevant to prove self defense). In the case at bar, the State of Montana charged Montana State Prison inmate, Pat Tracy, with assault on a prison guard, Glen Galle, in 1994. J.A. 84, ¶ 4.

Assault on a peace officer was and is a felony in Montana. Mont. Code Ann. § 45-5-202(2)(c) (1993). Because Tracy was serving a sentence for a prior felony, he faced up to 100 years confinement under Montana's "two strikes" statute. Mont. Code Ann. § 46-18-502(1) (1993); Tracy Aff., J.A. 84, ¶ 12.

Montana State Prison is divided into Minimum, High, and Maximum security "sides." Following the alleged assault, in accordance with Prison policy, the Prison moved Tracy from the High Security side to segregation in the Prison's Maximum Security unit. J.A. 78, ¶ 3.

Kevin Murphy was an inmate legal clerk on the High Security side of Montana State Prison, where Tracy had been housed. J.A. 78. Murphy had been appointed by the Prison and trained under the Prison's legal clerk program. The Prison adopted that program to satisfy its duties to provide means of access to the courts then required by *Bounds v. Smith*, 430 U.S. 817 (1977). C.R. 38, exhibit 4 at 1.

Initially, the Inmate Legal Clerk program provided that the Prison Librarian would assign cases to inmate legal clerks depending upon the clerk's case load. C.R. 38, Ex. 3. It is undisputed that, as the program evolved, the process of providing assistance became less formal. Sometimes legal clerks provided assistance on a first-come, first-serve, walk-in basis. The librarian also assigned legal clerks to inmates who sent written requests (called "kites.") At other times, inmate legal clerks provided assistance in response to requests sent directly to them. Murphy Aff. ¶ 5, J.A. 87.

The same rules applied if a requesting inmate was housed in the Prison's Maximum Security unit. Murphy Aff. ¶ 3, J.A. 87. Although the Prison decided that, for security reasons, High Security side legal clerks could no longer visit the Maximum Security unit (Max), it is undisputed that High Security legal clerks were not forbidden from providing assistance altogether and were still permitted to correspond with Max inmates. Murphy Aff., ¶¶ 3-4, J.A. 87. Other inmates who were not legal clerks were also permitted to correspond with Max inmates. J.A. 34, 36.

Tracy requested help from Murphy, who had provided Tracy with legal help on many occasions in the past. J.A. 87, ¶ 6. Tracy asked for Murphy's help on his case through several channels, including a request to the Prison's librarian. J.A. 84, ¶ 7. The librarian, who was in charge of the legal clerk program, told Tracy that High Security inmates were no longer allowed to visit the Maximum Security unit. Tracy Aff., ¶ 10, J.A. 84. He arranged for a Low Security side law clerk to see Tracy.

Id. That law clerk had a reputation for breaching confidences and Tracy therefore refused to speak with him. *Id.*

Tracy's requests and the charges against Tracy came to Murphy's attention. Murphy Aff. ¶ 3, J.A. 78. Although he was not permitted to visit Tracy, Murphy could look into reports that officer Galle had made sexual advances to inmates. Murphy Aff. ¶ 8, J.A. 88. Murphy learned that a number of inmates had circulated a petition complaining of Galle's wrongful conduct in other matters. *Id.*

According to the Prison's policy and his job description, Murphy's job was to "counsel with complaining inmates," to "define issues in matters to be addressed through legal channels," to instruct inmates in document preparation and legal research, and to instruct inmates on procedures in civil rights and post-conviction matters "and other forms of asserting claims." Inmate Legal Clerk Program 1; Law Clerk Job Description 1, C.R. 38, Ex. 3. The requirements for his position included "[b]asic understanding of criminal and civil procedure," the ability to perform research, experience in pleadings and forms, an ability to communicate well and to maintain a high level of professional confidentiality. *Id.*

Acting within the scope of those duties, on February 16, 1995, Murphy wrote to Tracy and summarized what he had learned. Murphy Aff., ¶ 9, J.A. 88, 50. Murphy wrote,

Dear Pat:

How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges.[1] Finally got everything taken care of. I can't come up to max anymore. [T]he lowside clerks go up there now. [T]hat's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!

Another point is that he grabbed you from behind. You tell your lawyer to get a hold of me on this. Don't take a plea bargain unless it's for no more time.

I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will

---

[1] Murphy had been out of prison for a short time. Murphy Aff. ¶ 7, J.A. 88.

write again when I get this thing against Galle finished.

Later. . . .

Murph

J.A. 50.

The Prison's Correspondence Policy (hereinafter the Mail Policy) permitted inmate-to-inmate correspondence, regardless of where the inmates were housed. Mahoney Aff. ¶ 14, J.A. 97. The Policy also permitted Prison officials to read those letters and its supervisory officers regularly did so. *Id.*, ¶¶ 14-16, J.A. 97. The Prison could also read Privileged Correspondence (letters to attorneys, judges, and other officials), "if there are reasonable grounds to believe that the mail is being sent contrary to this policy. . . . " Mail Policy VII. A, J.A. 43. Murphy thus knew that his letter would be read by prison officials before being delivered to Tracy. Murphy Aff. ¶ 10, J.A. 88. He did not believe that Officer Galle would see his letter, *id.*, J.A. 88, and it appears that Galle did not see the letter.

Petitioner Robert Shaw, the Correctional Supervisor in Murphy's housing unit, read Murphy's letter and began disciplinary proceedings against him.

Tracy never learned of the information in Murphy's letter. He did not see the letter until it was brought to his attention by Murphy's attorneys nearly 18 months later. Tracy Aff. ¶ 11, J.A. 94. By then he had pled guilty to felony assault in order to avoid being sentenced as a persistent felony offender. *Id.*, ¶ 12, J.A. 84.

After reading Murphy's letter, Shaw charged Murphy with violating Prison Disciplinary Rule 009 (Insolence),

Rule 022 (Interference with Due Process Hearings), and Rule 025 (Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution). J.A. 52, 54, 57. Murphy requested a hearing on all three charges. The hearing officer, Petitioner Larry Bearley, concluded that Murphy did not violate Rule 025 (Conduct Which Disrupts or Interferes with the Security or Orderly Operation of the Institution), but did violate Rule 009 (Insolence) and Rule 022 (Interference with Due Process Hearings). Br. for Pet. 11; Pet. for Writ of Cert. 6. His findings were based on the content of Murphy's letter.

Insolence is defined in Montana State Prison Policy No. 15-001, Rule 009, as "Words, actions or other behavior which is intended to harass or cause alarm in an employee." The Policy includes examples that explain its scope: "Cursing; abusive language, writing or gestures directed to an employee." J.A. 10.

Shaw's Insolence charge against Murphy alleged:

> While routinely monitoring Institutional mail, I (CS Shaw) noticed statements in a letter from Inmate Murphy to Inmate Tracy. In this letter, Inmate Murphy accused CO Galle of being an overzealous guard who punishes and harasses inmates for a personal pleasure. Inmate Murphy also accused CO Galle of making homo-sexual advances towards inmates. Inmate Murphy stated that CO Galle retaliated against Murphy by writing him up on two rule infractions.

J.A. 52.

At Murphy's hearing, hearing officer Bearley concluded, with respect to the Insolence charge, "evidence states c/o Galle retaliated against inmate Murphy by

issuing Inmate Murphy a class II infraction. That statement indicates unprofessional actions which tend to intimidate the employee." J.A. 60.

Rule 022, "Interference with Due Process Hearings" is not defined in Policy No. 15-001. J.A. 14. Instead the Policy offers the following examples of what would constitute a violation of the rule:

> Intimidating or tampering with an informant or a witness, tampering with or destroying evidence; interfering with an employee in the process of writing a conduct report; making a false statement of misconduct against another inmate or staff that could result in a disciplinary action. (This violation should not be charged for as a [sic] retaliation for the writing of a grievance.)

Id.

Shaw's charge of "Interference with Due Process Hearings" alleged:

> While routinely monitoring institutional mail I (CS Shaw) noticed comments in a letter from Inmate Murphy to Inmate Tracy concerning an incident that had occurred with an assault on CO Galle. In this letter, Murphy tries to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of. Inmate Murphy states he tried to "do something" about CO Galle, but He (Murphy) was retaliated against. There is no evidence of any of the statements in this letter to be fact.
>
> J.A. 54.

As to the Interference with Due Process charge, hearing officer Bearley concluded, "The statement referring to C/O Galle making homosexual advances to another inmate would result in disciplinary action against stated employees of the D.O.C." J.A. 62.

Murphy appealed both decisions to Warden Michael Mahoney, who denied the appeals. Murphy was sentenced to five days detention, which sentence was suspended. J.A. 59.

Neither Shaw nor any other Prison official charged or punished Murphy for violating any rule that governed his legal clerk duties. Further, no Prison official claimed that Murphy had violated the Prison Mail Policy.

II. Proceedings Below.

On October 24, 1995, Murphy filed a complaint against Petitioners in the United States District Court for the District of Montana alleging that they punished him for the content of his letter to Tracy. J.A. 63. Murphy alleged that Prison officials deprived him of his rights to free speech and of access to the courts. He brought his action "on his own behalf, as an inmate law clerk" and also brought "this action on his own behalf, as an inmate, subject to the disciplinary policies of the Department of Corrections. . . . " J.A. 65, ¶¶ 10, 11.

Murphy's First through Third Claims for Relief were premised on his role as an inmate legal clerk. J.A. 66-67. The Fourth and Fifth Claims for Relief were premised upon Murphy's status as an inmate. J.A. 67. Among other things, Murphy sought a declaration that Disciplinary

Rules 009 and 022 were both vague and overbroad as applied to him. Complaint, ¶¶ 20-21, Prayer for Relief ¶¶ 1-2, J.A. 67. Murphy sought only prospective declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. J.A. 67-68. (Contrary to the Prison's suggestion, Br. for Pet. 14 n.4, Murphy did not seek expungement of his record. *See* J.A. 67-68; *see also Edwards v. Balisok*, 520 U.S. 641 (1997); *Heck v. Humphrey*, 512 U.S. 477 (1994).)

Murphy accepts the Prison's description of the proceedings in the United States District Court. The District Court granted summary judgment for the Defendants. (Note, however, that the District Court also found that Murphy did not satisfy the *Sandin v. Conner*, 515 U.S. 472 (1995), requirement that he demonstrate that his restraint exceeded the expected conditions of his sentence. P.A. 24. Because Murphy did not allege a denial of procedural due process to which *Sandin* would apply, the District Court's *Sandin* holding is superfluous.)

The United States Court of Appeals for the Ninth Circuit reversed the District Court and directed entry of summary judgment for Murphy. *Murphy v. Shaw*, 195 F.3d 1121 (CA 9 1999), P.A. 1, 15. The Prison timely petitioned this Court for review.[2]

The Ninth Circuit's decision is premised upon two First Amendment grounds. First, "the letter itself constitutes speech that, outside of the prison context, would

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[2] At the time of the Ninth Circuit's consideration of this case, Murphy was confined at a regional prison in Great Falls, Montana. He is currently confined at a state prison in Shelby, Montana. The Petitioner's belief that he is housed at Montana State Prison in Deer Lodge, Pet. Br., 14 n.4, is mistaken.

doubtless enjoy the protection of the First Amendment." *Murphy*, 195 F.3d at 1125, P.A. 8-9. Second, "the provision of legal assistance . . . is an activity protected by the First Amendment." *Id.*, 195 F.3d at 1126, P.A. 9. The lower court's second conclusion is grounded in context: the Prison had appointed Murphy as an inmate legal clerk and had authorized his legal clerk activity.

The court below cited its earlier decision in *Rizzo v. Dawson*, 778 F.2d 527, 531 (CA 9 1985), in support of its second proposition. *Rizzo* held that, in order to state a claim of retaliation for writ-writing, the prisoner "must also allege that the prison authorities' retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals." *Rizzo*, 778 F.2d at 532.

Thus, the Ninth Circuit's holding is premised upon two First Amendment rights: the right to communicate facts and advice about another's case, regardless of whether the inmate is a legal clerk and, when assistance is permitted by a prison, the right to assist without imposition of sanctions that are addressed to the content of that assistance. Because the Prison neither prohibited inmate-to-inmate correspondence nor prohibited legal clerk assistance to inmates in its Maximum Security Unit, the Ninth Circuit engaged in a straightforward analysis under this Court's holding in *Turner v. Safley*, 482 U.S. 78 (1987). The Court of Appeals concluded that the Prison's punishment of Murphy failed to satisfy the *Turner* test.

SUMMARY OF THE ARGUMENT

Montana State Prison inmate Kevin Murphy wrote a letter to inmate Pat Tracy to give him information and advice regarding a defense in Tracy's criminal case. This information disparaged a prison guard, and the Prison punished Murphy for that reason. The question presented is whether a prison may do so.

Whatever we may say about the reasoning of the lower court in resolving this question, its judgment was correct. Murphy should not have been punished for the content of his letter.

1. The right to convey information and advice regarding pending criminal litigation is a "core" First Amendment right. As such, and because it is not lost as a result of conviction of a crime, a prisoner does not lose that right as an incident to confinement.

While a prison has legitimate penological interests that it may assert, regulation of the content of speech that communicates information and advice about pending criminal proceedings and intended for use in those proceedings is not one of those interests. Evaluation of speech communicating facts and advice material to a criminal defense is exclusively a province of the judicial branch and its judges, attorneys, and jurors. A prison has no business preventing the communication of that information merely because it believes it to be false or because it dislikes what it says.

2. The Prison's punishment of Petitioner Murphy fails the *Turner/Abbott* test. Evidence in the record fails to demonstrate any logical connection between the Prison's

articulated interests of preventing inmate-staff confrontation and of ensuring the integrity of its due process proceedings. Murphy was not punished for words spoken to a staff member, but for words written about a staff member and intended to be communicated to an outside attorney.

The Prison's punishment of Murphy for what he said also failed to satisfy the second part of the *Turner* test. The Prison claims that Murphy had other avenues for his speech – that he could have written directly to Tracy's attorney. The Prison, however, punished Murphy for the content of his letter. It did not matter to whom the letter was addressed.

Requiring prisons to refrain from punishing inmates when their letters contain information and advice about legal proceedings outside the prison imposes no burden on prison resources. The Prison claims that it would have to distinguish "legal mail" from non-legal mail and that this would be an impossible task. The Prison raises this claim for the first time in this Court. The Prison fails to point out the obvious. Because it already punishes prohibited inmate speech, and may do so legitimately, its officers engage in the day-to-day function of distinguishing protected from unprotected speech. A holding that protects speech communicating information and advice gives guidance to those officers.

Finally, ready alternatives satisfy the Prison's articulated interests. The Prison claimed that Murphy could have written to Tracy's attorney. If this is true, the corollary must be true. Instead of punishing Murphy for the

content of his letter, the Prison could either have forwarded it to Tracy's attorney or returned it to Murphy with instructions to send it to counsel.

3. If Prisons were permitted to punish prisoners for speech critical of staff, other public interests would be adversely affected. This Court many times has justified prison restrictions on the press and other persons outside the prison because of the relatively unfettered right of correspondence between prisoners and outsiders. Moreover, when the prison regulates or prohibits speech critical of staff that is intended for a courtroom, it harms the integrity of the judicial process. Ironically, the Prison here interfered with a due process hearing when it prevented Tracy from learning information material to his defense to his criminal charges.

4. This case does not affect the other interests articulated by the Prison and the amici. Prisons may inspect and read prisoner mail, including "legal mail." Prisons may prohibit inmates from acting as legal clerks. Prisons may prohibit inmates from conducting investigations and engaging in other associative activities that they feel will affect the order and security of the institution. A holding that a prison may not punish for the content of advice and information regarding a pending criminal case does not create a right of one inmate to meet and counsel with another.

5. Punishing an inmate law clerk for his advice to another inmate implicates the second inmate's right of access to the courts. The right of access consists of two prongs. Under the first, the prison has a duty of non-interference with a prisoner's right to defend against

criminal charges. Under the second, a prison has a duty to ensure that a prisoner may bring post-conviction petitions and challenges to the prisoner's conditions of confinement, matters that are not the subject of Sixth Amendment protection.

Saying that the right of access is satisfied by the appointment of counsel in a criminal case is not the same as saying the prison did not violate its duty of non-interference. A prison may interfere with a prisoner's criminal defense, even if the prisoner has an attorney. That is what occurred in the case at bar.

Murphy, as an inmate legal clerk, has standing to raise this issue. Because Murphy was punished, Tracy did not learn of information material to his defense. Their interests are intertwined and Murphy is in as good, if not a better position, to articulate the right of access. Both suffered injuries but only Murphy was in a position to bring the claim to redress Tracy's.

6. The Prison and the amici invite this Court to rule on the question of whether inmate "legal mail" has the protection of the First Amendment. This question is not at issue in this case, because the Prison permitted correspondence between inmates, whether the correspondence addressed legal matters or not. Contrary to the Prison's claim, *Turner* did not address the question.

If the question were to be addressed in this case, it should be resolved in favor of protecting the communication. This Court may hold simply that a prison must ensure that information material to a criminal defense can reach the accused inmate or her attorney.

Because the Prison had no interest in punishing an inmate for communicating information material to another inmate's criminal defense, this Court should affirm the judgment of the Court of Appeals.

ARGUMENT

I. THE PRISON HAD NO LEGITIMATE INTEREST IN CENSORING INFORMATION COMMUNICATED FOR USE IN A PENDING CRIMINAL CASE.

A. Inmates Retain Various First Amendment Rights Including the Right to Communicate Information and Advice About a Pending Criminal Proceeding.

Prisoners do not lose all protection of the Constitution when they enter the prison gate. *Turner*, 482 U.S., at 84. A convicted felon "retains a variety of important rights that the courts must be alert to protect." *Meachum v. Fano*, 427 U.S. 215, 225 (1976). These include "those first amendment rights that are not inconsistent with his status as a prisoner or with legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

This Court has called the communication of information or advice about pending litigation one of the " 'core First Amendment rights'. . . . " *In re Primus*, 436 U.S. 412, 432 (1978) (quoting *Buckley v. Valeo*, 424 U.S. 1(1976).) This Court has repeatedly held that giving advice or imparting information relevant to possible or ongoing litigation is speech, as well as association, protected by the First

Amendment to the United States Constitution. *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 5-6 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). The Trainmen, for example, routinely sent a Lodge secretary to injured railroad workers or their survivors to "recommend that the claim not be settled without first seeing a lawyer" and to refer them to a favored lawyer. As to these practices, this Court said, "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them. . . . " *Brotherhood of Railroad Trainmen*, 377 U.S., at 5. The right to communicate such information and advice is protected.

B. The Prison Had No Legitimate Penological Interest in Punishing Respondent's Speech.

The *Primus* line of cases addressed non-prisoner speech. Those cases require the State to show both a compelling interest in speech regulation and to demonstrate that the means chosen to advance that interest are narrowly drawn.

The standards for prisoner speech are different: in prison, when it conflicts with legitimate penological interests, some speech may be prohibited and other speech regulated. Nevertheless, prisoners retain cognizable speech rights. The State must demonstrate that its prohibition or regulation of prisoner speech satisfies the standards of *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989), and *Turner v. Safley*, 482 U.S. 78, 89 (1987). These

cases ask if a prison has any legitimate penological interests to be served by its rules, practices, or actions. *Id.*

In the case at bar the Prison lacked a legitimate penological interest in punishing Murphy for his words. Information and advice relevant to a defense in a criminal case is speech of the highest order. The state has no legitimate interest in suppressing such information. In fact, the opposite is true. More than merely protecting such communication, this Court has, as an incident to due process, compelled it. *See Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam); *Pyle v. Kansas*, 317 U.S. 213, 215-216 (1942); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that state suppression of evidence favorable to the accused deprives the accused of due process of law and that the prosecution, when asked, must communicate mitigating and exculpatory information to the accused). Similarly, the Sixth Amendment ensures that the accused has the opportunity to present evidence in his defense. *Pointer v. Texas*, 380 U.S. 400 (1965); *Taylor v. Illinois*, 484 U.S. 400 (1988). That opportunity is denied when the state interferes with the communication of that information. This Court has thus held that prison regulations or practices that impose substantial burdens on defense counsel "unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts. . . . " *Procunier v. Martinez*, 416 U.S. 396, 419-420 (1974), *overruled on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989).

If *receipt* of information and advice relevant to a criminal defense is a constitutional right of the highest order, then giving the same information and advice must be a constitutional right of equal magnitude. *Cf., Virginia*

State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-757 (1976) ("where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both"). The communication of such information is protected even if it is critical of state officials. Speech critical of the exercise of the State's power "lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034-35 (1991).

What was the value of the speech in Murphy's letter? Murphy told Tracy that he, Murphy, had also been the victim of Galle's retaliation ("all that happened is that I received two writeups from him myself as retaliation"), a fact which, if proven at trial, would have been relevant to the question of Galle's bias. Murphy also recounted information that he had learned from others in the Prison. ("Galle is an overzealous guard" who "has an agenda to punish and harass inmates"; Galle has made "homosexual advances.") Finally, he imparted some legal advice: "Another point is that he grabbed you from behind. You tell your lawyer to get a hold of me on this. Don't take a plea bargain unless it's for no more time." This is advice akin to "You ought to sue," or, "Your case is worth a lot of money. You ought to get a lawyer."

The Prison punished Murphy for statements critical of a staff member but made to aid in preparation for a criminal trial that would take place outside the prison. The undisputed evidence demonstrated that Murphy did not intend or expect officer Galle, the subject of his report, to see his letter. Murphy's letter was not directed to Galle. Nothing in the record hints that Galle ever saw it or heard of it. If Galle was to be confronted with Murphy's statements, it would be by Tracy's attorney in

the courtroom. The Prison had no legitimate interest in controlling that process.

When the communication is directed to a courtroom, this Court has ensured that it reaches it without state interference. In *Ex parte Hull*, 312 U.S. 546 (1941), the Prison refused to mail a habeas petition pursuant to its regulation that provided for review of "all legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals" to determine if they were "properly drawn." *Ex parte Hull*, 312 U.S., at 548-549. This Court was blunt in its evaluation of the regulation. "Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." *Id.*, at 549; *see Bounds v. Smith*, 430 U.S. 817, 834 (1976) (Burger, C.J., dissenting) (stating that the state "may not act in such a manner as to interfere with the individual exercise of . . . federal rights"); *id.*, 430 U.S. at 838 (Rehnquist, J., dissenting) (observing that *Hull* and other "access" cases generally stand for the proposition that the State may not erect a barrier between the prisoner and the courts); *Lewis v. Casey*, 518 U.S. 343, 368 (1996) (Thomas, J., concurring) (pointing out that *Bounds'* predecessors comprise two lines of authority, one of which prohibited "prison regulations that restricted or effectively prohibited inmates from filing habeas corpus petitions or civil rights lawsuits"); *cf., Cochran v. Kansas*, 316 U.S. 255, 257-258 (1942) (holding that prison could not legitimately frustrate efforts to appeal).

The proposition that the Prison had no legitimate interest holds even if we assume that Murphy's statements were false. Determining the truthfulness of the

information proffered by Murphy for use in a court proceeding was a judicial, not a penological, function. Nevertheless, Murphy was punished because (as the charge alleged), "Murphy trie[d] to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of." J.A. 54. Those "certain actions" would have been the introduction of evidence material to Tracy's defense.

Just as this Court ensures that a prisoner's words addressed to a court may be heard, the Courts of Appeals have vigorously asserted the judicial branch's power to determine questions of frivolousness and truthfulness. *See Adams v. James*, 784 F.2d 1077, 1083 (CA 11 1986) (Clark, J., concurring in part) (noting that frivolousness and good faith are concerns of the courts and not the prison administration); *Nolan v. Scafati*, 430 F.2d 548, 551 & n.4 (CA 1 1970) (holding that prison could not refuse to mail an inmate's letter to the Civil Liberties Union because prison believed it contained "lies").

The merit of Murphy's claims would have first been measured by Tracy's defense counsel. Had he found them wanting, that would have been the end of the matter. Had defense counsel found Murphy's claims credible, they would then have been tested by the prosecutor under cross examination and in rebuttal. Finally, the fact-finder in Tracy's case, whether judge or jury, would have made the final determination about the veracity and credibility of Murphy's claims.

If the prosecutor believed any inmate's testimony to be false, the state could bring a perjury charge, again to be resolved by a court of law and not by the Prison. The

court also had the power to impose contempt sanctions on a witness. These are all functions of the judicial branch. The Prison, however, would arrogate these powers to itself.

By stretching its Disciplinary Rules to fit Murphy's letter, Montana State Prison extended its authority into the court room where it has no interest in order and discipline. The Prison conferred upon itself the authority to determine if evidence offered for use at a criminal trial is "true." If the Prison's regulations are given this breadth, prison officials could punish most prisoners' offers to testify on behalf of an inmate and against a staff member. Under its application of Rule 022 (Interference with Due Process Hearings), the Prison may threaten any inmate who volunteers to offer testimony on behalf of another prisoner when that evidence alleges employee misconduct, J.A. 14, 62, or whenever the Prison believes, "There is no evidence of any of the statements in this letter to be fact." J.A. 54, 62. Under its application of Rule 009 (Insolence), the Prison may threaten to punish an inmate for tendering evidence any time it feels the evidence may "intimidate the employee" or "harass or cause alarm in an employee." J.A. 10, 60.

The interests triggered by Murphy's letter were judicial and evidential. The Prison therefore lacked a legitimate interest in punishing Murphy.

The Prison, however, articulates various other interests that are legitimate in the abstract. These should be tested against the facts of this case under a standard *Turner* analysis.

II. THE PRISON'S PUNISHMENT OF MURPHY WAS NOT REASONABLY RELATED TO THE PENOLOGICAL INTERESTS IT ARTICULATES.

A. The *Turner* Test.

When the state articulates legitimate penological interests, *Turner* sets forth the factors that are relevant in determining the reasonableness of its actions. "First, there must be a 'valid rational connection' between the [prison's actions] and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S., at 89. Second, we ask if "there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S., at 90. Third, the courts must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally." *Id*. "Finally, the absence of ready alternatives [that accomplish the prison's stated goal] is evidence of the reasonableness of a prison regulation. [citation omitted.] By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id*.

B. There is No Logical Connection Between the Prison's Punishment of Murphy and the Interests it Asserts.

Any "valid, rational connection" between the prison's actions and its asserted penological interest must be supported by competent evidence in the record. *Abbott*, 490 U.S., at 414 n.12; *Turner*, 482 U.S., at 98 (striking down inmate marriage ban, observing, "petitioners

have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing [violent love triangles]"); *cf., Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993) (even though state's asserted interests in regulating CPAs were "substantial," it had failed to show a connection between those interests and its proposed regulation of CPAs' commercial speech); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-790 (1978) (assertions that corporate speech would drown out other points of view not shown by the record); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 580-581 (1971) (record was "devoid of evidence" that supported order enjoining Union's "legal advice" to injured workers); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied").

In this case the Prison did not offer in the lower courts and has not offered in this Court any evidence that demonstrates a connection between its legitimate penological interests and its punishment of Murphy.

1. The Prison had no interest in security and order in this case.

The Prison's interests in security and order were not at issue. Although charged, Murphy was found not guilty of a violation of Disciplinary Rule 025, "Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution." Pet. Br. 11.

This case does not present the question of whether a prison may impose disciplinary punishment based on evidence found in a prisoner's correspondence. Without question, had Murphy outlined an escape plan, had he described a plan to attack another, or had he notified Tracy of the time and place when contraband would be brought in, that kind of statement could be used as evidence to invoke punishment. In that instance Murphy would not have been punished for what he said. He would have been punished for actions that his written words revealed. In this case Murphy was punished for what he said, when those words were not evidence of criminal or other wrongdoing.

2. The Prison did not demonstrate a connection between Murphy's punishment and its interest in regulating speech directed to its staff.

Murphy was charged with and found guilty of violating Rule 009, "Insolence," and Rule 022, "Interference with Due Process Hearings." We consider those offenses in order.

If the Prison's application of Rule 009, "Insolence," is to pass muster, then evidence must demonstrate a logical connection between its application to Murphy's words and the legitimate penological interest invoked to justify it. *Turner*, 482 U.S., at 89-90. The record shows no connection.

This Court has recognized a right to confront and criticize law enforcement officers outside the prison context. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *City*

of Houston v. Hill, 482 U.S. 451 (1987). Murphy recognizes that an inmate's exercise of that right inside a prison in many circumstances would intrude upon the Prison's legitimate interests in order and rehabilitation. As part of its interest in order and rehabilitation, the Prison has a legitimate interest in reducing staff-inmate confrontations. Rules that prohibit insulting or profane remarks directed to a staff member, even if the words may be less offensive than the "fighting words" of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), are permissible in the prison setting. If Murphy had addressed his words directly to Galle, had he shouted them in the Prison yard, then they would have come within the province of the Prison to regulate or punish. *Cf., Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940) (noting that even religious speech could incite disorder and thereby constitute a breach of the peace).

The Prison may not, however, make the same claim in the case at bar.

In this case Murphy's words were not directed to a Prison employee. They were words about a Prison employee. Even the Prison's Disciplinary Rules (under which Murphy was charged) distinguish words addressed *to* a Prison employee from words ***about*** a Prison employee. Rule 009 notes that "Insolence" applies to "language, writing or gestures directed *to* an employee." Rule 009; J.A. 10 (emphasis supplied). Rule 022 exempts statements critical of employees when they are included in a grievance addressed to Prison administrators. Rule 022, J.A. 14.

Put differently, in the context of this case, the Prison exempts criticism about an employee when it is addressed to Prison administrators, but punishes the same criticism about an employee when it is intended to be addressed to a court. The Prison offered no evidence to explain why one should be exempted and the other punished.

It is undisputed that Murphy did not believe that officer Galle would see his letter. Murphy Aff. ¶ 10, J.A. 88. The Prison offered no evidence that the officer ever saw it. Prison officials have never submitted evidence demonstrating a connection between its penological interest in reducing staff-inmate confrontations and an inmate's communicating information and advice relevant to another prisoner's criminal defense for use in a courtroom, when that information disparages a prison employee.

3. The Prison did not demonstrate a connection between Murphy's punishment and its interest in ensuring the integrity of its due process hearings.

The Prison has an interest in ensuring that its due process hearings are orderly and that the testimony and other evidence submitted in those hearings is accurate. *See* Mahoney Aff., ¶ 4.c, J.A.96 (stating that inspection of mail furthers the Prison's interest in preventing plots to have inmates lie in due process hearings). The Prison, however, has not demonstrated how a letter conveying

information for use in a court proceeding and recommending that an inmate's attorney first review the information affects the Prison's interest in its own proceedings.

4. Because the Sixth Amendment and due process rights of other prisoners are implicated, any evidence the Prison might proffer to demonstrate a connection between its legitimate interests and Murphy's punishment would have to be very probative.

Even if the Prison had proffered the necessary evidence, it would have to be closely related to an articulated interest, for the Prison would be regulating not only the speaking prisoner's First Amendment rights, but also the receiving prisoner's due process rights. *Brady v. Maryland; Pyle v. Kansas; Mooney v. Holohan, supra; cf., Martinez,* 416 U.S., at 408 (both parties to correspondence have free speech interests). This is so because the essence of Murphy's communication was, "don't plead guilty, I have learned and know personally facts about the guard's reputation for treatment of other inmates." This was good advice because, as Murphy pointed out above, Montana admits evidence of the character of the alleged victim to support a claim of self defense. Rules 404(a)(2); 405, Mont. R. Evid.; *Shadwell,* above (prior threats and reputation for violence were admissible).

Had Murphy said, "I think you have a defense under *Shadwell,*" that surely would not have been punishable. But Murphy wrote about the traits themselves. If Murphy had paraphrased *Shadwell* (i.e. "Galle has made threats and has a reputation for violence to inmates"),

that should not make his statement punishable. The statements are fundamentally the same, but the Prison punishes references to character traits under Rule 009. Whether Murphy describes the traits or used the shorthand, "a defense under *Shadwell,*" the uttering of either statement would be subject to sanction by the Prison.

C. If a Prison Punishes Content of Communications, Then Inmates Have No Other Avenues by Which to Communicate Criticism of Prison Staff.

If the inmate has "alternative means of exercising the right" after the avenue complained of is foreclosed, then the prison's actions are not seen as exaggerated. *Turner,* 482 U.S., at 90. Murphy, however, was punished for what he said, not for how he communicated his message. Punishing Murphy for the content of his message cut off all avenues of communication.

A prisoner has only two means of notifying a defendant or his attorney that the prisoner knows facts relevant to the defendant's case. He may speak or he may write. Because the Prison punishes an inmate for the content of the communication, it does not matter how many avenues of communication may be available. Regardless of the avenue, the content of the communication is punished by the Prison.

The Prison contends that the court below applied this *Turner* standard incorrectly when it concluded that nothing in the record showed that Murphy had access to the name and address of Tracy's lawyer. The Prison contends that Murphy could have written to Tracy's lawyer, and

that such a letter would have been permitted. This begs two questions.

First, it does not matter whether Murphy had access to Tracy's attorney or not. Murphy was punished for the content of his letter, without regard to the nature of his addressee. (The letter would not necessarily have been privileged from inspection. *See* Mail Policy ¶ I.B.2, J.A. 35; ¶ VII.A, J.A. 43.) Second, if writing to Tracy's lawyer was the preferred avenue, as the Prison contends, then we must ask two questions. Why did the Prison punish Murphy instead of sending his letter to Tracy's attorney? If that were too great a burden, then why punish instead of returning Murphy's letter to him with instructions to send it to Tracy's attorney? Both methods address the Prison's articulated interests. That the Prison punished Murphy instead of redirecting his letter demonstrates the Prison's "exaggerated response." *Turner*, 482 U.S., at 90.

D. Accommodating the Right to Communicate Advice and Information About a Defense in a Criminal Case Has No Legally Recognizable Impact Upon Staff, Other Inmates, or Prison Resources.

Turner considers the impact of accommodating the inmate's right upon staff, other prisoners, and prison resources. *Turner*, 482 U.S., at 90; *Abbott*, 490 U.S., at 418. Here the Prison contends for the first time that requiring it to distinguish "legal mail" from non-legal mail would

impose "an intolerable burden."[3] The claim is empty because the Prison already engages in that kind of function on a regular basis.

The Prison punishes insolent speech. Rule 009, J.A. 10. It must therefore distinguish between insolent speech and speech that is not insolent (protected speech) as a matter of course. (Anything else would constitute arbitrary punishment, which would violate the due process clauses. *Cf.*, *Sandin v. Conner*, 515 U.S. 472, 487 n.11 (1995) (noting that prisoners retain protection from arbitrary punishment).) The Prison punishes threatening speech. Rule 004, J.A. 9. Inevitably, its hearing officers are called upon to distinguish threatening from non-threatening, protected, speech. The Prison punishes speech that incites a riot or strike, Rule 011, J.A. 11, and presumably does not punish speech that does not incite. It punishes speech that interferes with due process hearings but would not punish speech that does not. More important, prison officials are routinely called upon to distinguish speech that is intended to be a grievance. Rule 022, J.A. 14.

Holding that the Prison may not punish the communication of information and advice material to an inmate's criminal case does not impose a burden. Instead it provides guidance to the prison officials in their day-to-day function of distinguishing permissible speech from impermissible speech.

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[3] This claim was not raised in the courts below. Br. of Appellee 12, *Murphy v. Shaw*, 195 F.3d 1121 (CA 9 1999); Def.'s Resp. to Pl.'s Mot. for Summ. Jmt. and Br. in Supp. of Mot. for Summ. Jmt. 6, *Murphy v. Shaw*, No. CV 95-62-H-CCL (D. Mont. July 8, 1996); C.R. 25.

E. Ready Alternatives Satisfy the Prison's Interests.

As Murphy noted above, the Prison's interest in disciplining "Insolence" appears to be prevention of inmate-staff confrontations. The Prison also has a legitimate interest in rehabilitating inmates. Teaching civility would appear to be related to an interest in furthering rehabilitation.

The alternatives available to the Prison appear in its policies. It punishes words directed **to** instead of **about** staff. *See* Rule 009, J.A. 10 (punishing "abusive language . . . directed to an employee"); Rule 022, J.A. 14 (exempting statements about an employee contained in a grievance). Nothing compels the Prison to show letters like Murphy's to the subjects of those letters. As the court below concluded, the Prison may readily prevent confrontations by shielding its staff from communications about them.[4]

With respect to its interest in rehabilitation, the Prison may impose rules with an eye to ensuring that inmates use acceptable means of resolving grievances and disputes. *Bradley*, 64 F.3d, at 1280. In this case, the

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[4] *Compare Bradley v. Hall*, 64 F.3d 1276, 1281 (CA 9 1995) (distinguishing disparaging remarks about staff from disparaging remarks to staff and finding the former protected); *Loggins v. Delo*, 999 F.2d 364, 376 (CA 8 1993) (same); *Brooks v. Andolina*, 826 F.2d 1266, 1268 (CA 3 1987) (same); *McNamara v. Moody*, 606 F.2d 621, 624 (CA 5 1979) (same), *with*, *Leonard v. Nix*, 55 F.3d 370, 374 (CA 8 1995) (distinguishing disparaging remarks about staff from disparaging remarks to staff and finding the latter unprotected); *Goff v. Dailey*, 991 F.2d 1437 (CA 8 1993) (same).

Prison's discipline of Murphy runs counter to this interest. Participation in the judicial process is an acceptable means of resolving disputes. Officer Galle's character was better addressed in the courtroom than in the prison yard.

The Prison's "Interference with Due Process Rule" furthers a legitimate interest in ensuring the integrity of its due process proceedings. *See* Mahoney Aff., ¶4.c., J.A. 96. This interest is not hindered by protecting speech that communicates information and advice about a proceeding taking place outside the Prison's jurisdiction. Protecting that speech acommodates the Prison's interest. Ironically, the Prison's enforcement of this rule did interfere with a due process hearing. Tracy was denied the opportunity to pursue and present a defense to his charges.

F. Conclusion.

Application of the four *Turner* factors demonstrates that the Prison's punishment of Murphy was not reasonably related to any of the legitimate penological interests that it articulates. The Prison failed to demonstrate a connection between its interest in preventing staff-inmate confrontations and its interest in the integrity of its due process hearings. Punishment of the content of Murphy's speech cut off all avenues of communication. Permitting Murphy's words to pass would have little or no effect on the Prison's staff and other inmates. Ready alternatives, including the redirection of Murphy's letter, demonstrated that the Prison's reaction was exaggerated.

III. PERMITTING PRISONS AND JAILS TO PUNISH INMATES FOR STATEMENTS CRITICAL OF THEIR STAFF AFFECTS OTHER PUBLIC INTERESTS.

A. The Public's Interests in Information About its Jails and Prisons and in the Legitimacy of Criminal Trials Outweighs the Prison's Interest in Suppressing Statements about its Staff.

This Court has repeatedly noted the important function that inmate communications play in the public oversight of jails and prisons. In several cases, this Court recognized the importance of the right of inmates to correspond with the press and relied upon that right to justify limitations on other First Amendment rights. *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (upholding prohibition on inspection of jail, stating, "Respondents have a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions"); *Pell v. Procunier*, 417 U.S. 817, 824, 826 (1974) (upholding prison's limits on face-to-face interviews in light of other alternatives and noting, "One such alternative available to California prison inmates is communication by mail"); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 847 (1974) (same, noting, "newsmen and inmates are permitted virtually unlimited written correspondence with each other").

In the case at bar the Prison punished Murphy for the content of his statements. Had Murphy included the same statements in a letter to the press, he would have been subject to the same sanctions. The Prison's view – that it may sanction Murphy for statements that disparage staff – is inconsistent with the *Pell* line of jurisprudence. The Prison would close the most important source that the

public has to learn about conditions in its jails and prisons and the practices of their guards.

This Court has also noted the role of free speech in the public education and petition functions of criminal trials. The primary purpose of a trial is to achieve justice. The trial also educates the public about the issues of the trial. A public trial serves to act as a check against abuse. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 568-569 & n.7 (1980). The public nature of the trial ensures that there is not only fairness but the perception of fairness. *Richmond Newspapers*, 448 U.S., at 570; *In re Oliver*, 333 U.S. 257, 270 (1948). The role of the witness thus goes beyond fair trial guarantees. It carries a free speech component as well.

The right to participate in the trial, a right that goes beyond the accused's right to a fair trial, is an ancient one. " 'There is an invitation, to all persons who can inform the Court concerning the matter to be tried, to come into the court, and they shall be heard.' " VI J. Wigmore, Evidence § 1834, p. 437 (J. Chadbourne Rev. 1976) (quoting *Cornish's Trial*, 11 How. St. Tr. 460 (1690).) This is, as this Court has said, "unbroken, uncontradicted history." *Richmond Newspapers*, 448 U.S., at 573.

> The First Amendment, in conjunction with the Fourteenth . . . share a common core purpose of assuring freedom of communication on matters relating to the function of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal

> trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court.

Richmond Newspapers, 448 U.S., at 575.

That is not to say that every witness, much less every inmate-witness, has an unvarnished right to appear at a trial and testify. The trial itself is subject to regulation by the presiding judge. The calling of witnesses and the eliciting of their testimony – and therefore the witness's right to give testimony – is likewise subject to regulation by the court. *See* Rule 104, Fed. R. Evid. And that is the point. The witness's interest in giving testimony should be regulated by the court, not by the Prison through its imposition of punishment.

B. An Accused's Interest in Obtaining Timely Exculpatory Facts Is Greater Now than it Was When *Brady* Was Decided.

In 1963, when *Brady v. Maryland* was decided, a defendant's opportunities to obtain post-conviction relief from a *Brady* violation were less restricted than they are today. No fixed time limit was placed on federal habeas or federal post-conviction petitions, *see* 28 U.S.C. §§ 2254; 2255 (1995), or on most state post-conviction petitions. *See* § 3, Uniform Post-conviction Procedure Act (1966), *in* 11A Uniform Laws Annotated 334 (1995); *In re McNair*, 189 Mont. 321, 615 P.2d 916 (1980).

Times have changed. Both state and federal statutes and court decisions have severely limited the time in which to seek post-conviction relief – even when the state has suppressed exculpatory evidence. *See* Mont. Code

Ann. § 46-21-102(1) (1999) (establishing a one-year statute of limitations); 28 U.S.C. § 2244(d)(1) (1999) (one year); 28 U.S.C. § 2263 (1999) (180 days for capital cases in qualifying states); *but see* 28 U.S.C. § 2244(d)(1)(C) (extending the period for information that could not reasonably have been discovered); 28 U.S.C. § 2263(b)(3)(B) (extending the deadline in capital cases for an additional 30 days for "good cause"). This case illustrates the impact: Tracy's claim that the Prison suppressed facts relevant to his defense is time-barred.

IV. THIS CASE DOES NOT IMPLICATE THE OTHER INTERESTS AND CONCERNS ARTICULATED BY PETITIONER AND THE AMICI.

A. The Prison Conflates This As-Applied Challenge With a Facial Challenge to Its Regulations.

The analysis of the issue in this case should not be undertaken with reference to the power to prohibit correspondence, which this Court ratified in *Turner*, but with reference to *Turner*'s four-part test and its requirement that evidence demonstrate a relationship between the Prison's articulated interest and its punishment of Murphy for the content of his writing. The Prison's analysis is appropriate to a facial challenge to its Rules, but not to a claim that those Rules have been applied to suppress speech. The question is not, "Are the Prison's Rules facially neutral?" Murphy did not challenge the Rules on their face. Instead the question is whether facially-neutral rules have been applied in an unconstitutional manner.

The record shows that the Prison expressly punished Murphy for the content of his letter. Under these facts, the application of these rules must satisfy *Turner*'s standards.

B. Many Matters to Which the Prison and Its Amici Point Are Not at Issue.

1. The Prison may inspect and read inmate-to-inmate mail.

Montana State Prison's Mail Policy has never been at issue in this case. The Policy permitted inmate-to-inmate correspondence and authorized Prison officials to inspect those letters. The Prison's power to inspect letters, whether for escape plans, contraband, or the like, has never been questioned in this case.

The Prison may also sanction inmates when the letters contain such things as contraband or escape plans. In such cases, the Prison is not punishing an inmate for the content of the letter, but for conduct that the content reveals. Murphy did not discuss prohibited conduct; his letter contained no contraband.

2. The Prison may prohibit inmates from holding the position of legal clerks and may prohibit inmates from acting as formal or informal writ-writers.

A rule that protects a prisoner from being punished for the content of his letter when he communicates information material to another inmate's criminal case does not affect the Prison's power to regulate the practice of

"writ-writing" or its power to establish, regulate, or abolish the formal position of inmate legal clerk. *See Johnson v. Avery*, 393 U.S. 483, 489-490 (1969). The Prison is free to tell Murphy that he no longer may assist inmates in the writing of writs: it may abolish the legal clerk position. It did not in this case. To the contrary, it employed Murphy as an inmate legal clerk.

The Prison and the United States accuse the court below of creating a "special right to assist." Their accusation is belied by the facts and the holding of the lower court. The Prison had assigned Murphy the duties of an inmate legal clerk. The Prison did not ban his activity and no ban on his activity was ever at issue. The Prison did not prohibit inmate legal clerks from assisting represented inmates. It did not prohibit Murphy from giving advice to Tracy. Neither was he prohibited from writing to Tracy. The holding of the lower court recognized this. P.A. 7-8.

3. The Prison may prohibit inmates from conducting investigations.

The Prison and its amici imagine inmates as roving paralegals. They exaggerate. Holding that the Prison may not punish an inmate for the content of his letter, when that content is advice and information material to another prisoner's defense in a criminal case, is far different from saying that the first inmate has a right to go forth and investigate. Murphy did look into the charges against Tracy, but the Prison neither prohibited his actions nor sanctioned him for them.

In the future the Prison may reasonably prohibit its inmates from actively looking into charges against another inmate. *See Zemel v. Rusk*, 381 U.S. 1 (1965). The Prison may regulate and prohibit prisoners' efforts to organize, whether for litigation or to act in concert for other purposes. *Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. 119 (1977). It may not, however, prohibit them from reporting to an accused inmate's attorney information that they learned in the lunch line.

4. The Prison may read inmate-to-inmate mail regarding legal matters.

Murphy has never claimed that his letter to Tracy was privileged from inspection. He knew that inmate-to-inmate mail was inspected and read by Prison officials pursuant to the Prison's Mail Policy. Murphy Aff. ¶ 10, J.A. 88. He did not and does not challenge the Prison's power either to inspect or to read his letters to inmates. This case and the holding of the court below do not raise that issue. Prisons may read inmate-to-inmate mail and they may read mail between inmates and inmate law clerks. This case does not change that proposition.

5. A holding that the Prison may not censor information and advice does not create a right to meet and counsel with another inmate.

The Prison and its amici call forth the spectre of inmate legal clerks asserting rights to meet with the

inmates they assist. The absence of this issue is dramatically set forth by the facts. The Prison did prohibit Murphy from visiting Tracy. He obeyed that rule. He did not challenge that rule. As it could before the lower court's decision, the Prison remains free to regulate the means by which information material to another inmate's criminal defense reaches that inmate. The Prison may not, however, suppress the message by punishing the messenger.

6. Conclusion.

A holding that a prison may not sanction a prisoner when he offers information and advice regarding another prisoner's criminal case, does not trigger the hypothetical outcomes proffered by the Prison and the amici.

V. THE IMPOSITION OF DISCIPLINE AGAINST INMATE LEGAL CLERKS FOR THE CONTENT OF THEIR ADVICE DEPRIVES OTHERS OF ACCESS TO THE COURTS.

A. Punishing Inmate Legal Clerks for the Content of Their Advice Constitutes a Deprivation of the Recipient's Right of Access to the Courts.

"Right of access to the courts" is shorthand for two unrelated sets of circumstances. A prison creates the first circumstance when its regulations or practices "unjustifiably obstruct . . . access to the courts. . . . " *Martinez*, 416 U.S., at 419-420; *see Bounds*, 430 U.S., at 834 (Burger, C.J., dissenting). When that happens, "It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims. . . . " *Lewis*, 518 U.S., at 349.

The second circumstance arises coincident to confinement. "[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.' " *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam). This Court's decisions hold that the right to petition for redress is not fully deprived as an incident to confinement. Although prisoners may not be the "litigating engines" that they might be outside the prison wall, they must be given some means by which to seek court review of their convictions or the conditions of their confinement. *Lewis*, 518 U.S., at 315. This second circumstance applies expressly to those litigating activities to which the Sixth Amendment right does not attach: seeking of post-conviction relief and filing of civil rights claims. In the case at bar, however, the Sixth Amendment right did attach to Tracy's defense of criminal charges in the trial court.

The Prison ignores the first circumstance and addresses only the second. It contends that Tracy's right of access was fully satisfied by the state's appointment of counsel to represent him. Saying Tracy had an attorney, however, is not the same as saying the Prison did not interfere.

A prisoner's fundamental right of access to the courts "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970) (three judge court), *aff'd sub nom., Younger v. Gilmore*, 404 U.S. 15 (1971). By its very terms and by the fact

that the "right of access" is premised on more than the right to petition, the right of access overlaps both due process and Sixth Amendment rights.

Although Tracy had an attorney, this did not diminish the Prison's duty not to interfere with his defense. Yet it applied its rules to Murphy and thereby interfered with Tracy's ability to present an arguably meritorious defense to the charge made against him. This is a far greater burden than causing defense counsel to be less efficient, which was found to interfere with the right of access in *Martinez*. *Martinez*, 416 U.S., at 420.

Murphy was the source of information material to Tracy's defense. That the prison trained him to be an inmate legal clerk does not change the analysis. If anything, it enhances the right, for the inmate legal clerk is more likely to recognize the significance of the facts.

B. Murphy Had Standing to Raise the Right of Access.

While Murphy's role of inmate legal clerk is not critical to the resolution of the free speech issue, it is necessary to the access to the courts issue. This Court and Courts of Appeals, when squarely presented with the question, have split on the question of whether an inmate legal clerk has standing to assert the right of access of the prisoner he would assist. Some have held or tacitly concluded that an inmate legal clerk has standing to assert the right of access to the courts. *See Johnson v. Avery*, 393 U.S. 483 (1969) (inmate law clerk asserted the access to court right of the inmates whom he assisted); *Gibbs v. Hopkins*, 10 F.3d 373, 378-79 (CA 6 1993) (holding inmate

law clerk may amend his complaint to allege denial of access to the courts by reason of his punishment); *Buise v. Hudkins*, 584 F.2d 223, 227 (CA 7 1978) (holding that *Johnson* "establishes that [the inmate law clerk] can raise the claims of the other inmates because in *Johnson* only the jailhouse lawyer was a party and the decision rested on the denial of access to the courts for his fellow inmates"). Others reach a different conclusion. *See Smith v. Maschner*, 899 F.2d 940, 950 (CA 10 1990) (recognizing controversy over law clerk's right to assert inmate's right of access).

The question of standing is governed by this Court's reasoning in *Singleton v. Wolff*, 428 U.S. 106, 114-16 (1976): "[T]he relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 428 U.S., at 115. Nevertheless,

> Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent.

Id., 428 U.S., at 116.

The relationship between Murphy and the inmates he assists is such that he is fully or nearly as effective a proponent of the right of access. When the prison disciplines an inmate legal clerk in a way that burdens the assisted inmate's right of access, the rights of both the

clerk and the person he assists are inextricably intertwined. When the prison disciplines a legal clerk for the content of his advice, it ultimately threatens, both directly and indirectly, those for whom the rule of mutual assistance was primarily intended. *Vaughn v. Trotter*, 516 F. Supp. 886, 893 (M.D. Tenn. 1980). If inmate legal clerks cannot raise access claims under these circumstances, prison officials would be free to prevent inmate access by the simple expediency of punishment and harassment of inmate legal clerks. This would erect a genuine obstacle to the inmate's ability to assert his right of access. Under such conditions, Murphy has standing to assert the right of access of the inmates he assists.

Unlike the abstract notions of access to the courts considered in *Lewis v. Casey*, the Prison officials here engaged in the active practice of punishing an inmate legal clerk because they did not like or because they disagreed with his statements. Murphy was disciplined and Tracy pled guilty without the benefit of Murphy's advice and information. When Prison officials hold out the promise of punishment for communicating certain things to an inmate who an inmate legal clerk is assisting, they ensure, as the Prison observes, Pet. Br. 14 n.4, that those communications will not occur, notwithstanding their importance to a claim to be made by the assisted inmate. This is an actual injury. *Laird v. Tatum*, 408 U.S. 1, 11-13 (1972). Neither Murphy's nor Tracy's injuries were theoretical. Under *Singleton*'s test, Murphy should have standing to assert a right of access to the courts.

C. Conclusion.

Murphy has established a violation of Tracy's right of access to the courts. Murphy, acting in his capacity as an inmate law clerk, attempted to bring a potential defense to Tracy's attention. Murphy's recommendation never reached Tracy, who was then prevented from investigating or raising the defense, and ultimately pled guilty to assault. Tracy Aff. ¶ 12, J.A. 84. Tracy's claim never made it into court. And Murphy, like the inmate in *Johnson v. Avery*, was disciplined for assisting. Murphy Aff., ¶¶ 5-6, J.A. 78.

VI. THE PRISON AND THE AMICI INVITE THIS COURT TO RULE ON THE RIGHT TO CORRESPOND REGARDING LEGAL MATTERS; WERE THIS ISSUE PRESENT IT WOULD BE RESOLVED IN FAVOR OF SUCH A RIGHT.

A. The Right to Correspond Has Not Been Put at Issue by the Facts in this Case.

Because the Prison permitted inmates to correspond with other inmates in its Maximum Security unit (and at other prisons), *see* Mail Policy, ¶ II.B.2, J.A. 36, the question of whether the Prison could properly prohibit letters that communicated facts and advice material to an inmate's criminal defense was not at issue. The Prison and amici, however, argue strenuously for such a prohibition. This Court need not reach that issue, for to do so would be to offer an advisory opinion. Nevertheless, if it is considered, the issue should be resolved in favor of a right to communicate facts material to a defense.

B. *Turner* Did Not Address the Application of Rules Prohibiting Correspondence Regarding Legal Matters.

The Prison goes to great lengths in a failed attempt to demonstrate that this Court, in *Turner*, approved the application of rules so as to prohibit inmate correspondence on legal matters. Pet. Br. 28-30. As the United States has pointed out in its amicus brief, Br. of U.S. 25, this Court upheld "the facial validity of the correspondence regulation," *Turner*, 482 U.S., at 99, which permitted inmate-to-inmate correspondence on legal matters, *id.* at 81, "read petitioner's additional challenge to the District Court's findings to be a claim that the District Court erred in holding that the correspondence regulation had been applied in an arbitrary and capricious manner," and remanded that question to the Court of Appeals. *Id.* at 100.

Permitting direct correspondence with another inmate is but one means of ensuring that facts material to a defense come to the attention of the accused and her attorney. Inmates may, as the Prison has pointed out, correspond directly with the accused's attorney. But this is true only if the inmate knows who and where the attorney is. Otherwise the facts that prove the accused's innocence may never see the inside of the courtroom. This Court should hold then, that when Prison officials act in such a way to prevent communication of material facts to an accused or her attorney, they violate the First and Sixth Amendments and the right of access.

This would call for nothing out of the ordinary. The Federal Bureau of Prisons currently permits inmates to

correspond with each other when they are witnesses or parties in the same legal action. 28 C.F.R. § 540.17. Murphy's letter to Tracy would have satisfied those standards. Articulating a rule that requires prisons and jails to ensure that material facts reach either the inmate or his attorney would do nothing more than carry out *Turner*'s "other avenue" factor. *Turner*, 482 U.S., at 90.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals should be affirmed.

Respectfully submitted,

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